No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS d/b/a REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Petitioners,

—v.—

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, in their official capacities,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATHARINE ES BODDE
Counsel of Record
CHAIR, SEX AND LAW COMMITTEE
THE NEW YORK CITY
BAR ASSOCIATION
125 Broad Street
New York, New York 10004
(212) 607-3375
kesbodde@gmail.com

Attorney for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Association of the Bar of the City of New York (the "Association"), through its Committees on Sex & Law, Domestic Violence, Civil Rights, LGBT Rights and Women in the Legal Profession, submits this *amicus curiae* brief in support of Petitioners in this case.

The Association is a professional organization of over 24,000 attorneys and law students who practice not only in the New York City metropolitan area, but also across the United States and internationally. The Association seeks to promote legal reform and improve the administration of justice through its more than 160 standing and special committees.

The Association's Sex and Law Committee addresses issues pertaining to gender and the law in a variety of areas with the goal of reducing barriers to gender equality in health care, the workplace, and civic life. The Association's Domestic Violence Committee focuses on issues related to gender-based violence, and is particularly concerned about policies that threaten women's sexual and reproductive rights in that context. The Association's Committee on Civil Rights seeks to advance the civil rights and liberties of all individuals, groups, and classes of persons against government abuse, systemic injustice, and other

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[1] Petitioners and Respondent consented in writing to the filing of this *amicus curiae* brief on December 7, 2015. Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, and no person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

forces that threaten the foundations of our constitutional democracy The Association's Lesbian, Gay, Bisexual and Transgender Rights Committee addresses legal and policy issues that are of particular concern for gay, lesbian, bisexual and transgender individuals. The Association's Committee on Women in the Legal Profession seeks to promote the full participation and interests of women in the legal profession.

Drawing upon the wide-ranging expertise of these five Committees and their members, the Association respectfully submits this *amicus curiae* brief in support of Petitioners in this case.

SUMMARY OF ARGUMENT

"[A] woman's right to terminate her pregnancy is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992) (*citing Roe v. Wade*, 410 U.S. 113 (1973)). In *Casey*, this Court provided a guiding principle for assessing the constitutionality of legislative restrictions on abortion services: a statute that places an "undue burden" on women's access to abortion is unconstitutional. *See id.* at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability "). Under this standard, states are prohibited from passing unnecessary and, as in the case at bar, counterproductive health regulations that place a substantial obstacle in the path of women by effectively eliminating access to abortion services. *See id.*

At issue here are two provisions of Texas House Bill 2 ("H.B.2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013), which require that: 1) abortion clinics meet the requirements of Ambulatory Surgical Centers, (hereinafter "ASC requirement") and 2) physicians have admitting privileges at a hospital within 30 miles (hereinafter "admitting privileges requirement").[2]

In overturning the District Court's finding that these requirements imposed an undue burden on Texas women's constitutional right to pre-viability abortion, the Fifth Circuit declared, "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes" or consider whether the law actually furthers the state's interest. *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015).

In so finding, the Fifth Circuit improperly relied on this Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("*Carhart II*"), for the proposition that courts should uphold abortion restrictions if any conceivable rationale exists for

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[2] The Act's "admitting privileges requirement" provides, in relevant part, that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a)(1); 25 Tex. Admin. Code §§ 139.53(c), .56(a). The "ambulatory surgical center requirement" provides, in relevant part, that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas Health & Safety Code] Section 243.010 for ambulatory surgical centers." Tex. Health & Safety Code Ann. § 245.010(a); 25 Tex. Admin. Code § 139.40.

their enactment. Contrary to the Fifth Circuit's characterization of this Court's precedent, *Carhart II* acknowledged this Court's critical duty to review a legislature's rationale for enacting restrictions when constitutional rights are at stake. *See id.* at 165 ("Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

In applying a standard akin to the lowest form of rational basis review rather than the "undue burden" standard, the Fifth Circuit erroneously upheld the contested provisions of H.B.2 by accepting wholesale the proffered explanation—i.e., that the provisions protect women's health[3]—without undertaking the analysis required by this Court's precedent. Specifically, the Fifth Circuit: (1) failed in its duty to review legislative findings when constitutional rights are at stake, and; (2) failed to apply the level of scrutiny required by law

Further, the Fifth Circuit upheld H.B.2's admitting privileges requirement despite this Court's

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[3] To the extent that Texas may try to argue that the provisions at issue in H.B.2 serve the dual purpose of promoting women's health and the state's interest in fetal life, "those arguments are misplaced." *See Whole Woman's Health v. Lakey,* 46 F.Supp.3d 673, 684 (W.D.Tex. 2014). The District Court noted that the contested provisions focus solely on the *performance* of abortions, not the decision of whether or not to seek an abortion. Thus, the "only possible gain realized in the interest of fetal life, once a woman has made the decision to have a previability abortion, comes from the ancillary effects of the woman's being unable to obtain an abortion due to the obstacles imposed by the act." *Id.*

long-recognized Due Process anti-delegation doctrine, under which legislatures are prohibited from delegating power to private actors to legislate and act arbitrarily—especially where, as here, there is no procedural mechanism for meaningful review. *See Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (quoting John Locke: "The legislative [body] can have no power to transfer their authority of making laws and place it in other hands"); *Washington ex rel. Seattle Title Trust v. Roberge*, 278 U.S. 116, 122 (1928) (limitations on delegation of power to private parties are applicable to states via Fourteenth Amendment).

For these reasons, and as set forth more fully below, the Fifth Circuit's decision in the instant case should be overturned, and the contested provisions of H.B.2 be declared unconstitutional.[4]

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[4] Similar laws requiring abortion providers to have hospital admitting privileges in area hospitals have been enjoined by state and federal courts in Alabama, Kansas, Louisiana, Mississippi, Oklahoma and Wisconsin. *See Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 2015 U.S. App. LEXIS 20369 (7th Cir. Nov. 23, 2015); *June Med. Servs., LLC v. Caldwell*, 2014 U.S. Dist. LEXIS 121555 (M.D. La. Aug. 31, 2014); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014); *Burns v. Cline*, 339 P.3d 887 (Okla. 2014); *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416 (S.D. Miss. 2013), *aff'd* 760 F.3d 448 (5th Cir. 2014); *Hodes & Nauser, MDs, P.A. v. Moser*, No. 11-cv-2365, Minute Entry, Docket No. 30. (D. Kansas July 1, 2011). Likewise, laws placing onerous regulations on medical (i.e., non-surgical) abortions have also been found unconstitutional. *See e.g., Planned Parenthood of Arizona, Inc. v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014); *Planned Parenthood of the Heartland v. Iowa Bd. of Med.*, 865 N.W.2d 252, 269 (Iowa 2015).

ARGUMENT

POINT I

THE FIFTH CIRCUIT ERRED IN FINDING THE CONTESTED PROVISIONS OF H.B.2 CONSTITUTIONAL AND MISAPPLIED *CASEY*'S UNDUE BURDEN ANALYSIS

As this Court established in 1973 in its seminal decision in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey* in 1992, a woman's right to terminate a pregnancy is a vital "component of [her] liberty." *Casey*, 505 U.S. at 871. The availability of legal abortion has fundamentally altered the social status and opportunities of women. *See id.* at 856 ("the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives").

In *Casey*, this Court sought to define the parameters of this fundamental right and provide meaningful guidance clarifying "the rights of the woman and the legitimate authority of the State" to regulate abortion, including: (1) recognition of a woman's constitutional right to an abortion before viability and to obtain it without "undue interference" from the state; (2) confirmation of the state's power to restrict abortions after viability except in circumstances which "endanger the woman's life or health"; and (3) acknowledging the state's legitimate interests in protecting the health of the woman and the life of the fetus. *See Casey*, 505 U.S. at 845-46. In so doing, the Court formulated the "undue burden" standard for analyzing whether a regulation infringes upon

this constitutional right, based on the central tenet that state regulation of abortion procedures must not impose unnecessary health regulations that present a "substantial obstacle" to a woman seeking an abortion. *Id.* at 877

This Court's constitutional jurisprudence over the ensuing decades has adhered to and built on *Roe*'s and *Casey*'s core holdings that laws regulating abortion—and purporting to do so for health and safety reasons—must, in fact, protect women's health. Indeed, the Court has repeatedly struck down, as unconstitutional, state regulations limiting abortion where such regulations did not allow for abortion where a woman's health was at risk, *see, e.g., Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 327-28 (2006) ("[O]ur precedents hold ... that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the [woman]"), or were unnecessary and often counterproductive health measures that burdened women's access to safe health care. *City of Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 438 (1983), *overruled on other grounds, Casey*, 505 U.S. at 870, 948 (law requiring that second trimester abortions be performed in hospitals not justified on basis of protecting woman's health and safety). In so finding, the Court has repeatedly tested—and rejected—regulations that limit or curtail constitutional rights where the legislature's justification and underlying fact finding are deemed misguided, insufficient or contrary to the legislation's effect in practice.

In the case at bar, the Fifth Circuit failed to fulfill the judiciary's functions in two critical

respects: first, it abandoned its duty to "check" legislative overreach by failing to review the legislature's rationale for the contested regulations; and second, the court misconstrued the "undue burden" standard set forth in *Casey* and its progeny.

A. Courts Have An Independent Constitutional Duty to Review the Legislature's Rationale Where Constitutional Rights Are at Stake

Through its role as the ultimate arbiter in upholding the Constitution and ensuring its fair application to all citizens, this Court has an affirmative duty to review the legislature's rationale for restricting constitutional rights, especially when confronted with overwhelming countervailing evidence. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (judiciary "retains an independent constitutional duty to review [a legislature's] factual findings where constitutional rights are at stake"). The responsibility conferred upon the nation's judiciary—in its crucial role as a "check" on other branches of government when actions undertaken by those branches infringe on constitutional rights—demands no less: "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.* (*citing Crowell v. Benson*, 285 U.S. 22, 60 (1932)). In holding that the contested provisions of H.B.2 passed constitutional muster, the Fifth Circuit eschewed its duty of meaningful review Instead, the court accepted the state's pretextual rationale

for the contested provisions without inquiring as to whether those regulations would actually further the state's purported goal of benefiting the health and safety interests of women seeking abortions.

The proper function of the judiciary in its role as guardian of individuals' constitutional rights against government overreach requires *de novo* review of legislative findings where the law threatens constitutional rights; the Fifth Circuit abdicated that responsibility in favor of simply "rubber stamping" the legislature's proffered rationale without examining whether the contested regulations supported it. As this Court has stated, "[t]here must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.' ... these standards ensure not only that the State's interests are proportional to the resulting burdens ... but also that the law does not [serve an improper purpose such as] seek[ing] to suppress a disfavored message." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011) (rejecting Vermont legislature's rationale for imposing speaker and viewpoint based restrictions on the sale of prescription data to pharmaceutical companies because legislature failed to establish that such restrictions actually furthered the state's legitimate interest in protecting the privacy of medical providers and patients).

This Court has routinely undertaken such judicial inquiry into legislative fact finding where constitutional rights are at stake, and deemed unconstitutional those laws that infringe on constitutional rights without fulfilling the laws' stated purposes. *See e.g., Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (rejecting state's rationales that barring discrimination claims based on sexual

orientation would either (1) promote state's interest in religious freedom of "landlords or employers who have personal or religious objections to homosexuality," or (2) conserve the state's "resources to fight discrimination against other groups"; "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them"); *see Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("the effect of a law in its real operation is strong evidence of its object"); *accord United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (holding a statute's "operation in practice confirms [its] purpose"). The Fifth Circuit's holding—i.e., that it is beyond the court's role to examine the wisdom of a law vis-à-vis the burdens it imposes—contradicts this Court's longstanding jurisprudence and eviscerates the judiciary's mandate to uphold constitutional rights against undue infringement.

B. The Fifth Circuit Failed to Exercise its Duty to Review the Texas Legislature's Rationale

The Fifth Circuit's refusal to engage in meaningful constitutional review of the state's purported rationale for the challenged regulation contravenes this Court's well-established precedent. *See Casey; accord Carhart II*; *see also, supra,* fn.4. Instead, the Court of Appeals accepted the state's proffered legislative justifications wholesale, and failed to acknowledge the overwhelming medical consensus that neither the ASC requirement nor the admitting privileges requirement promote women's health, but in fact reduce access to safe health care services. Indeed, the facts demonstrating the

safety of abortion procedures in Texas prior to the enactment of H.B.2, along with the medical profession's overwhelming rejection of such regulations, demonstrate that no health-related justifications exist. *See Brief for American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians and American Osteopathic Association in Support of Petitioners as Amicus Curiae,* p.5-6, *Whole Woman's Health v. Cole,* 2015 U.S. S.Ct. Briefs LEXIS 3528 (Oct. 5, 2015) ("[The law's] requirement that abortion facilities meet the standards for ASCs is devoid of any medical or scientific purpose ... [and the] requirement that abortion providers maintain admitting privileges at local hospitals adds no medical benefit to the treatment of Texas women and is contrary to current medical practice").

Unlike the Court of Appeals' decision in this case, the District Court's reasoning and analysis was based on extensive fact finding—resulting in the inevitable conclusion that H.B.2 bears no legitimate relationship to the state's proffered interest in protecting women's health and, in fact, does just the opposite. *See Whole Woman's Health v. Lakey*, 46 F Supp. 3d 673, 684-85 (W.D. Tex. 2014) (concluding that the state's purported "[medical] concerns ... [were] largely unfounded and ... without a reliable [evidentiary] basis" where "[a]bortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny").

Indeed, the District Court noted that these provisions purporting to promote women's health would, in practice, be detrimental to the health and safety of women in need of abortion services: "[h]igher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit." *Id.*

Moreover, the District Court found no evidence to support the view that any appreciable reduction in risk or improvement in outcomes would result from requiring abortions to be performed in ambulatory surgical centers. *See id.* In fact, "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be *nearly arbitrary*." *Id.* (emphasis added).[5]

The evidence supporting the admitting privileges requirement similarly fails to demonstrate the state's interest in promoting women's health.

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[5] The ASC requirements impose extensive facilities standards, including "electrical, heating, ventilation, air conditioning, plumbing and other physical plant requirements as well as staffing mandates, space utilization, minimum square footage, and parking design." *Lakey, supra*, 46 F.Supp.3d at 680-81. Notably. of the 433 licensed "ambulatory surgical centers" in Texas, 336 (78%) are "grandfathered" or have been permitted to waive some or all of the requirements and still obtain licensure, whereas such "grandfathering" and waivers are specifically prohibited for abortion providers. *See id.*

> Evidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers. [And] [a]dditional objectives proffered for the requirement, such as physician screening and credentialing are not credible due, in part, to evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency

Id. at 685. The District Court concluded, in light of the evidence, that "at most," the credentialing rationale was "weak and speculative." *Id.*[6]

The District Court's factual conclusions in this case were entirely consistent with the overwhelming consensus of medical associations in Texas and across the nation. *See* Texas Medical Association, TMA comments: Senate Bill 5 by Sen. Glenn Hegar Jr., and House Bill 60 by Rep. Jodie Laubenberg, June 23, 2013[7]; Texas Hospital Association, State-

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[6] Furthermore, if the admitting privileges requirement were intended, foremost, as a mechanism to promote women's health through continuity of care, it would have included a requirement that a provider continue to treat a patient who has suffered an abortion-related complication, i.e., to "accompany her to the hospital, treat her there, visit her [and] call her." *See e.g., Planned Parenthood of Wis., Inc. v. Schimel,* 2015 U.S. App. LEXIS 20369 at *7 (7th Cir., Nov. 23, 2015). The absence of such a follow-up requirement speaks volumes about the true purpose of the admitting privileges regulation.

[7] *See* https://www.texmed.org/uploadedFiles/Current/Advocacy/Public_Health/TMA%20Letter%20to%20Full%20House%20SB%205HB60_62313.pdf (last accessed Nov. 19, 2015).

ment of Opposition to Section 2 of the Committee Substitute for Senate Bill 5 by Glenn Hegar relating to the regulation of abortion procedures, providers and facilities[8]; *Brief for American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians and American Osteopathic Association in Support of Petitioners as Amicus Curiae, p.5-6, Whole Woman's Health v. Cole,* 2015 U.S. S.Ct. Briefs LEXIS 3528 (Oct. 5, 2015).

Interestingly, Texas imposes no admitting privileges or ASC requirements on procedures far riskier than abortion. *See* Brief for Petitioners filed December 28, 2015, at 16-17 (citing record). The fact that Texas targeted only abortion providers in imposing H.B.2's requirements is of particular significance given this Court's jurisprudence holding that courts should be suspicious of laws that single out a certain group for differential treatment. *See e.g., Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 535 (1993); *Sorrell,* 131 S. Ct. at 2670-71. Moreover, the ASC requirement makes no distinction between surgical and medical abortions—despite the fact that a medical abortion involves a woman taking a pill at the clinic and then another at home, a procedure that has no logical nexus with operating room standards that could have any bearing on patient care. *See Whole Woman's Health v. Lakey,* 46 F.Supp.3d 673, 682 (W.D.Tex. 2014).

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[8] *See* http://www.tha.org/HealthCareProviders/Advocacy/CommentLetters/THA%20Testimony%20in%20opposition%20to%20SB%205%20(special%20session).pdf (last accessed Nov. 19, 2015).

In upholding the ASC and admitting privileges requirements of H.B.2, the Fifth Circuit failed in its duty to perform any meaningful review of the legislature's asserted rationale that such provisions promote women's health. In abandoning its duty to examine the "wisdom or effectiveness of a law" and, instead, mandating that courts accept the legislature's rationale wholesale where *any* rationale is given—and without regard to whether the regulations at issue were reasonably designed to advance the state's purported interest—the Fifth Circuit effectively precludes the judiciary from exercising its role in guarding against unconstitutional measures.

The Fifth Circuit's failure in this instance is particularly egregious in light of the District Court's findings—backed by the medical establishment—that neither of the contested provisions serves the stated purpose of promoting women's health but, rather, threatens it, thus underscoring the pretextual nature of the proffered justifications. *See Lakey*, 46 F Supp. 3d at 683. This Court's jurisprudence—and, indeed, the very foundation of our constitutional democracy—relies upon the power and duty of the judicial branch to review legislative findings, especially where constitutional rights are at stake. The Fifth Circuit's reasoning thus eliminates the role of courts in the tripartite system of government and renders the courts, in essence, a mere rubber stamp for the legislature. This Court should not countenance such a result.

C. The Fifth Circuit Misconstrued the Undue Burden Standard Established By This Court's Decision in *Casey*

In overturning the District Court's finding that H.B.2 imposed an undue burden on Texas women's constitutional right to pre-viability abortion, the Fifth Circuit failed to apply the "undue burden" standard articulated by this Court in *Casey*. Instead, it applied a standard akin to the most deferential form of "rational basis review," and found that, because the state had proffered a rationale for the contested provisions of H.B.2 that purportedly furthered a legitimate state interest, i.e., Texas's interest in promoting the health of women seeking abortion services, the law passed constitutional muster. In so finding, the Fifth Circuit missed the mark.

In *Casey*, this Court explained:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Casey, supra, 505 U.S. at 877 In other words, although "the State may enact regulations to further the health or safety of a woman seeking an abortion[,] ... [u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 878.[9]

Therefore, an abortion-restricting statute justified upon medical grounds "requires not only reason to believe ... that the medical grounds are valid, but also reason to believe that the restrictions are not disproportionate, in their effect on the right to an abortion, to the medical benefits that the restrictions are believed to confer and so do not impose an 'undue burden' on women seeking abortions." *Schimel*, 2015 U.S. App. LEXIS 20369 at *32 (internal citations omitted). *See also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) ("*Van Hollen III*"), *cert. denied*, 134 S. Ct. 2841 (2014) ("The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."). The undue burden standard in *Casey* thus "requires [the court] to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman." *Planned Parenthood of the*

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[9] Under the plain meaning of the Court's language, determining whether a health regulation is "unnecessary" requires inquiry into how well the law succeeds in advancing its stated purpose.

Heartland, Inc. v. Iowa Bd. of Med., 865 N W.2d 252, 264 (Iowa 2015).

As demonstrated in Point I(B) above, Texas's purported justifications—*i.e.*, its interest in women's health—bears no connection to the regulations at issue. Both the ASC requirement and the admitting privileges requirement provide no demonstrable benefit to women's health and, in fact, cause more harm than good. Where, as here, the record contains "no evidence whatsoever that the law furthers any interest in women's health," the Court should find that it imposes an undue burden on the right to pre-viability abortion. *Planned Parenthood of Arizona, Inc. v. Humble*, 753 F.3d 905, 912-13 (9th Cir 2014) ("The more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test"); *Schimel*, 2015 U.S. App. LEXIS at *22 ("a statute likely to restrict access to abortion with no offsetting medical benefit cannot be held to be within the enacting state's constitutional authority"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 78-79 (1976) ("the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health ... [i]t comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks").

Since its enactment, H.B.2 has caused the majority of abortion facilities in the State of Texas to shut down. Prior to the enactment of the challenged requirements, Texas had 41 licensed facilities providing abortion services on a regular

basis.[10] As of November 2015, there were only 19, and many of those clinics would also have to close if the Fifth Circuit's decision is upheld in this case, leaving 10 or fewer remaining clinics. And unless this Court intervenes, the only abortion providers who will be permitted to continue their operations are the nine ASCs that currently offer abortion services in the state's four largest cities (Austin, Dallas, Houston, San Antonio), and the Petitioner's McAllen facility, which has only a provisional judicial exception pursuant to its as-applied challenge in this case. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596 (5th Cir 2015) (enjoining the enforcement of H.B.2's ASC regulations against the McAllen facility).

These figures are especially alarming when one considers the 5.4 million women of reproductive age currently living in Texas, and the fact that approximately 60,000-72,000 legal abortion procedures have been performed annually throughout the state in recent years. *See Lakey*, at 681. The idea that the 10 or fewer remaining facilities located in five cities can provide these medical services without severely affecting women's health and safety and infringing on women's access to abortion services is simply unfathomable.

H.B.2 erects substantial obstacles that affect all women throughout the state of Texas, but the barriers to access for women who live in rural areas are especially problematic and nearly insurmountable when those women are poor, single parents, or otherwise unable to travel large distances

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[10] *See* J.A. 1429 (Letter of Stephanie Toti to Fifth Circuit Court of Appeals dated June 12, 2015).

in order to receive appropriate medical care in terminating a pregnancy.[11]

According to the District Court's opinion in this case, enforcement of the challenged provisions would leave 1.3 million women more than 100 miles from the nearest clinic; 900,000 further than 150 miles; and 750,000 further than 200 miles. *See id.* Meanwhile, the state's mandatory waiting period, which often requires women to travel to a clinic more than once, only exacerbates the various burdens imposed by H.B.2's pretextual restrictions on abortion services. *See id.* at 682-83.

The closures would also create far more demand on the few remaining clinics in operation, resulting in unavoidable delays which create higher risks of complications attendant to abortions at a later gestational age, and increase the risk of women attempting to self-induce abortions. As the District Court acknowledged, "[e]ven if the remaining clinics could meet the

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[11] *See also Humble*, 753 F.3d at 916 (finding that the "increase[d] costs to the patient for transportation, gas, lodging, and the time ... take[n] off from work ... are significant and sometimes prohibitive."); *Van Hollen III*, 738 F.3d at 796 ("Some patients will be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down."); *Strange*, 33 F. Supp. 3d at 1357 ("For [women of limited financial resources], going to another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off.").

demand, the court concludes that the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." *Id.*[12] The "substantial obstacles" imposed by H.B.2's unwarranted mandates cannot be justified by the state's pretextual interest in raising the standards of care. The purported benefits of H.B.2—if any existed—are far outweighed by the tremendous burdens that the law places upon a woman's constitutional right to terminate her pregnancy

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[12] The severe burdens enunciated by the District Court are consistent with those undue burdens identified by the Seventh and Ninth Circuits and the Iowa Supreme Court in unconstitutional abortion-restricting laws. *See Schimel*, 2015 U.S. App. LEXIS at *7-8, 34, 38; *Van Hollen III*, 738 F.3d at 798; *Humble*, 753 F.3d at 916; *Planned Parenthood of the Heartland*, 865 N.W.2d at 264-68. Those courts agree that factors such as increased cost, decreased access due to transportation and availability, and delays that may increase health risks were relevant in determining the severity of the burden imposed by laws such as the one at issue here. *Humble*, 753 F.2d at 916 ("Plaintiffs have introduced uncontroverted evidence that the Arizona law substantially burdens women's access to abortion services. ..."); *Schimel*, 2015 U.S. App. LEXIS at *27-28 (affirming injunction of proposed law where its effect would be closing clinics, difficulty for open ones absorbing patients, significant delays and attendant health risks); *Van Hollen III*, 738 F.3d at 796 (plaintiffs face irreparable harm of clinic closure and delay, which "can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal").

POINT II

H.B.2 IS AN UNCONSTITUTIONAL DELEGATION OF POWER TO PRIVATE HOSPITALS

This Court has long recognized that when a legislature gives private actors "the power to regulate the affairs of an unwilling minority," such act "undertakes an intolerable and unconstitutional interference with personal liberty and private property " *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down provisions of Coal Act that delegated regulatory authority to nation's highest-output coal producers, allowing them to impose restrictions on smaller and independent coal companies in violation of due process). This anti-delegation doctrine, embedded in the Due Process Clause, prohibits the legislature from delegating its lawmaking authority to private actors. *See id.* H.B.2's admitting privileges requirement violates this principle by permitting private hospitals to decide whether or not to grant admitting privileges to abortion providers—which essentially restricts or eliminates their medical practices—without any mechanism for meaningful review. For this reason, H.B.2 offends long-standing principles of proper delegation and is unconstitutional.

A. The Admitting Privileges Requirement Delegates to Hospitals the Power to Legislate and Act Arbitrarily, in Violation of the Due Process Clause

"The legislative [bodies] can have no power to transfer their authority of making laws and place it in other hands." *Industrial Union Dep't v. Am.*

Petroleum Inst., 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (quoting John Locke). Although rooted in separation of powers principles, *see, e.g., Panama Refining Corp. v. Ryan*, 293 U.S. 388, 420-430 (1935) (collecting cases), the anti-delegation doctrine rests fundamentally on due process considerations, *see, e.g., Carter Coal*, 298 U.S. at 311 (holding that "one person may not be entrusted with the power to regulate the business of another" without constituting "a denial of rights safeguarded by the due process clause of the Fifth Amendment."). *Cf. Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring) ("At the center of the Framers' dedication to the separation of power was individual liberty ... [at] the heart of [which] were the Lockean private rights: life, liberty, and property."). Indeed, delegation of legislative authority to private parties "is legislative delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311.

The reason for this prohibition is straightforward: as Justice Alito recently remarked, "[l]iberty requires accountability," and "[o]ne way the Government can regulate without accountability is by passing off a Government operation as an independent private concern." *Ass'n of Am. R.R.*, 135 S. Ct. at 1234 (Alito, J., concurring); *see also Roberge*, 278 U.S. at 122 (legislative grants of authority to private parties are particularly noxious when delegated power is amorphous and may be exercised "for selfish reasons or arbitrarily," and where there is "no provision for review").[13]

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[13] The limitations on the delegation of power to private parties are applicable to the states via the Fourteenth Amendment. *See, e.g., Washington ex rel. Seattle Title Trust v. Roberge*, 278 U.S. 116, 122 (1928) (invalidating a

The Court must guard against such unconstitutional delegation of unbridled power to private parties, for "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Ass'n of Am. R.R.*, 135 S. Ct. at 1234 (Alito, J., concurring); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 366-67 (1886) (invaliding licensing ordinances after concluding that "[t]he power given to [private licensing body] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint").

The admitting privileges requirement of H.B.2 is an improper delegation of legislative authority to Texas hospitals by giving them the power to restrict, and even eliminate, the practices of other physicians without any opportunity for meaningful review. The record contains "evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency," *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 695 (W.D. Tex. 2014), and, indeed, that these denials have been arbitrary and inconsistent.

For example, four board-certified physicians affiliated with Plaintiff Whole Woman's Health sought to obtain admitting privileges from eight hospitals within 30 miles of the Whole Woman's Health clinic in McAllen, but were unable even to

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Washington land use ordinance that gave two-thirds of private owners veto power over land use determinations that affected other private parties); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (invalidating a Virginia ordinance as violating due process by permitting private property owners to enact building lines that affect other owners).

submit an application to seven of them because the applicants failed to meet those hospitals' requirement of obtaining the signature of a "designated alternate" physician willing to look after the physician's patients in his or her absence. J.A. 392-93 (Lynn Direct at ¶¶ 7 12); J.A. 717-20 (Miller Direct at ¶¶ 8-16). Despite having admitting privileges at other Texas hospitals and being certified physicians, these doctors saw their admitting privileges at these hospitals—and, accordingly, their ability to work at clinics—turn on whether private parties were willing to serve essentially as cosponsors on their application. No discretion, guidance or rule governs any proposed designated alternate's refusal to serve as such; such doctors may simply refuse to sign an otherwise qualified physician's application entirely at their will and caprice.

The record further shows that even when prospective applicants are able to overcome the preliminary, arbitrary restrictions in hospital privilege applications, their requests can be—and, indeed, have been—denied arbitrarily. The four prospective McAllen applicants, for example, were able to obtain a "designated alternate" signature to submit an application to one area hospital, but that application was denied for still other reasons, as per the official letter explaining the denial, "not based on clinical competence." J.A. 393-94 (Lynn Direct ¶ 14); and J.A. 719-20 (Miller Direct at ¶ 14); J.A. 603, 604-05, and 835-38 (Pl. Exh. 068, 69, and 071). And one El Paso board-eligible physician was granted temporary privileges at a local hospital, but then received a letter denying her application for permanent privileges because she purportedly did not "meet [the] requirement [sic] for successfully

completing a residency in the field of specialty for which clinical privileges are required." J.A. 729 (Eldridge Direct at ¶ 21); Pl. Exh. 060, J.A. 729, 736. Yet the hospital's application form states that completion of such a residency is not necessary if a physician can show "active participation in the examination process leading to certification in family practice"—qualifications which the rejected applicant had. Pl. Exh. 062, J.A. 730, 736. It is no wonder, then, that the hospital's CEO later admitted to State investigators that after learning that the applicant was an abortion provider, the hospital "looked at the bylaws and application to see if there was a reason to deny privileges to [her]." *Id.* The applicant's temporary privileges were subsequently suspended as well.

Such outcomes are not surprising given that, under Texas law, a hospital may enforce a variety of requirements unrelated to clinical competence. For example, many Texas hospitals require that a physician guarantee a certain number of admissions or commit to performing a minimum number of procedures at the hospital each year. *See* Brief for Petitioners filed on December 28, 2015 at 21-22 (citing record). Furthermore, hospitals may withhold admitting privileges even if a physician meets the requirements. Tex. Health & Safety Code Ann. § 241.101(a)(2); J.A. 393-94 (Lynn Direct at ¶ 14); J.A. 719-20 (Miller Direct at ¶ 14); J.A. 603, 604-05, 835-38 (Pl. Exh. 068, 069, 071). Physicians in the state of Texas are thus subjected to substantially different requirements and erratic procedures depending on which hospitals they apply to for admitting privileges.

Furthermore, the admitting privileges requirement of H.B.2 contains no provision for review of

denials of admitting privileges for the petitioner physicians. At the outset, nothing in the Texas Health and Safety Code provides redress for situations in which a physician may not even be able to apply for failure to meet arbitrary prescreening requirements such as the "designated alternate" provision described above. All that Texas law requires of hospitals is that they adopt "reasonable" rules regarding admitting privilege qualifications, Tex. Health & Safety Code § 241.101(b), and that hospitals not deny privileges "on any ground that is otherwise prohibited by law." *Id.* § 241.101(f). But the term "reasonable" is not defined in the statute, and the courts have recognized that such standards are "difficult if not impossible to articulate." *Sosa v. Bd. of Managers of Val Verde Mem'l Hosp.*, 437 F.2d 173, 176 (5th Cir. 1971).

The Texas Health and Safety Code provides generally that the process for *considering* applications or revoking licenses must satisfy the procedural due process requirements of 42 U.S.C. § 11101 *et seq.* Tex. Health & Safety Code § 241.101(c). But little or no procedural protections are accorded to physicians who somehow overcome the arbitrary thresholds and succeed in submitting applications, like the McAllen doctors, or physicians who, like the El Paso doctor, succeed in obtaining temporary admitting privileges but, ultimately, are denied admitting privileges. While in Texas, "[i]t has been clearly established for years that a doctor has no constitutional right to the staff privileges of a hospital merely because he is licensed to practice medicine," *Sosa v. Bd. of Managers of Val Verde Mem'l Hosp.*, 437 F.2d 173, 175 (5th Cir. 1971) (citing *Hayman v. Galveston*, 273 U.S. 414 (1927)), the state must nonetheless satisfy procedural due process requirements.

Texas law provides that a physician who is denied admitting privileges may require the hospital to attend a mediation session, and specifically precludes any additional course of action beyond the mediation to the physician. Tex. Health & Safety Code Ann. § 241.101(d-e). Moreover, the Texas state courts have been clear that no judicial review is available under any theory when a physician is denied admitting privileges by a hospital. *E.g. Winston v. Am. Med. Int'l., Inc.*, 930 S.W.2d 945, 956 (Tex. App. Houston 1996). "Texas follows the rule that the exclusion of a physician from staff privileges is a matter which ordinarily rests with the discretion of the management authorities and is not subject to judicial review " *Tigua Gen. Hosp. v. Feuerberg*, 645 S.W.2d 575, 578 (Tex. App. El Paso 1982).

Thus, because it does not set any standards by which hospitals should evaluate admitting privileges for abortion providers and because it fails to provide for meaningful review of those decisions, the admitting privileges provision of H.B.2 runs afoul of the anti-delegation principle embedded in the Due Process Clause. As the Texas Supreme Court has recognized, "the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government." *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 469 (1997). The non-delegation doctrine thus protects an important component of liberty, "to have a standing rule to live by ... made by the *legislative power*," and to be free from "the inconstant, uncertain, unknown, arbitrary will of another

man." *Ass'n of Am. R.R.*, 135 S. Ct. at 1243 (2015) (Thomas, J., concurring) (citing J. Locke, Second Treatise of Civil Government §22, p. 13 (J. Gough ed. 1947)); *see also id.* at 1234 (Alito, J., concurring). Whether couched as stemming from the separation of powers inherent in the Constitution's structure, or in the important principles of Due Process, the idea remains that "[i]f a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free." *Id.* at 1245 (Thomas, J., concurring) (citation omitted).[14]

B. The Lower Courts Incorrectly Rejected or Refused to Reach the Non-Delegation Argument

In the proceedings below, the district court incorrectly held that it could not reach the unconstitutional delegation argument because that issue had been decided against Petitioner in this litigation by the Fifth Circuit's decision rejecting the facial challenges to H.B.2. *Whole Woman's Health v. Lakey*, No. 1:14-CV-284-LY, at *12 (W.D. Tex. Aug. 1, 2014) (order on motion to dismiss), *aff'd sub nom Whole Woman's Health v. Cole*, 790 F.3d 563, 589 (5th Cir. 2015) (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th

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[14] "The state cannot grant hospitals power it does not have itself." *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 380 F. Supp. 1153, 1158-59 (E.D.N.C. 1974). To hold otherwise would "allow the Government 'to evade the most solemn obligations imposed in the Constitution by simply resorting'" to delegation schemes. *Ass'n of Am. R.R.*, 135 S. Ct. at 1233 (majority opinion) (citing *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 397 (1995)).

Cir. 2014)). In *Abbott*, the Fifth Circuit relied in turn on the Eighth Circuit's rejection of a similar non-delegation argument, reasoning that:

> The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs' due process rights than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board.

Women's Health Center of West County, Inc. v. Webster, 871 F.2d 1377, 1382 (8th Cir. 1989) *quoted in Abbott*, 748 F.3d at 600. Both courts are mistaken.

Preliminarily, the district court, and this Court, can properly reach the unconstitutional delegation argument, because the rejection of the facial challenge in *Abbott* does not preclude an as-applied challenge to the statute on the same grounds. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (explaining that a zoning ordinance could be invalid as applied even if it was rational on its face).[15] And,

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[15] Indeed, given the varying conclusions the federal courts have reached regarding the application of the non-delegation doctrine to admitting privileges statutes in the abortion context, this Court should resolve the applicability of the doctrine to the kinds of statutes at issue here, and should do so in Petitioner's favor. *Compare Abbott*, 748 F.3d at 600; *Webster, supra*, at 1382, *with Tucson Women's Clinic v. Eden*, 379 F.3d 531, 556 (9th Cir. 2004) (holding that the non-delegation doctrine prohibits delegating to a private party the ability to restrict physicians from providing abortions based on criteria the state could not itself impose).

on the merits, the admitting privileges at issue are not analogous to general licensing statutes. The procedural protections of general medical licensure are distinct from, and markedly more robust than, those associated with admitting privileges (generally and as applied in this case).

Medical licenses and admitting privileges first diverge in their overall purpose and execution. Licensure of medical professionals serves to protect the general public by ensuring that physicians are properly qualified to practice medicine. *See, e.g.*, Tex. Occ. Code Ann. § 151.003 (1999) ("[A]s a matter of public policy it is necessary to protect the public interest through enactment of this subtitle to regulate the granting of that privilege [of practicing medicine] and its subsequent use and control."). Accordingly, in Texas, the legislature enacted a comprehensive statutory scheme that both details the qualifications an applicant must possess to obtain a medical license and empowers the Texas Medical Board as the state agency that enforces these requirements by reviewing the application. Tex. Occ. Code Ann. §§ 152.001, 155.001-.009 (1999). Thus, all applicants in the state of Texas are statutorily subjected to the same qualification requirements and application procedures. Moreover, given these various, legislatively enacted qualifications specifically enumerated in the statute, one would be hard-pressed to argue that the authority to legislate medical licensing criteria has been delegated to a private entity.

In contrast, admitting privileges requirements permit hospitals to determine which physicians may practice at that specific hospital. Tex. Health & Safety Code Ann. § 241.101 (2015). Rather than enact a comprehensive scheme for regulating the

admitting privileges requirements a hospital may enact, the Texas statute specifically provides that the state will not interfere with a hospital's authority to "make rules, standards, or qualifications for medical staff membership; or grant or refuse to grant membership on the medical staff." *Id.* § 241.101(a)(1-2). Unlike the licensing scheme, the admitting privileges regime permits hospitals to set their own rules, individually. Accordingly, as described, Texas hospitals may enact any requirement to qualify for admitting privileges, whether or not related to the practice of medicine, and may withhold admitting privileges even if a physician meets the requirements. Tex. Health & Safety Code Ann. § 241.101(a)(2).

Furthermore, medical licenses and admitting privileges are provided with divergent legal protections. If the Texas Medical Board denies an applicant's license, that applicant is statutorily entitled to due process rights—the applicant must be given notice of the denial and may request a hearing before an Administrative Law Judge to contest the denial. Tex. Occ. Code. Ann. § 155.007; *see Goldberg v. Kelly*, 397 U.S. 254 (1970). The same is true if the Texas Medical Board suspends or revokes a physician's medical license. Tex. Occ. Code. Ann. § 164.004 (1999). Yet, as explained, the due process rights associated with a denial of admitting privileges are, at best, unclear, *see supra* at II.A.

Taken together, the differences between medical licenses and admitting privileges demonstrate that the lower courts have incorrectly held that the constitutionality of one barrier to medical practice demonstrates the constitutionality of a second barrier to medical practice. The ultimate

purpose, execution, and impact of admitting privilege requirements demonstrate they are plainly different from medical licensure requirements and are an unconstitutional delegation of legislative powers to private entities.

CONCLUSION

For the foregoing reasons, and for those presented by petitioners, the Fifth Circuit's decision should be reversed.

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Respectfully submitted,

KATHARINE ES BODDE
Counsel of Record
CHAIR, SEX AND LAW COMMITTEE
THE NEW YORK CITY
BAR ASSOCIATION
125 Broad Street
New York, New York 10004
(212) 607-3375
kesbodde@gmail.com

Attorney for Amicus Curiae

APPENDIX

LIST OF CONTRIBUTORS

JUDITH ARCHER
Women in the Legal Profession Committee

JENNIFER BECKER
Domestic Violence Committee

AGATHA COLE
Civil Rights Committee

MIRAH CURZER
Sex & Law Committee

ROSEANGELY FRICK
Women in the Legal Profession Committee

MOHIT GOURISARIA
Domestic Violence Committee

OMAR GONZALEZ-PAGAN
LGBT Rights Committee

MARCI GOLDSTEIN KOKALAS
Women in the Legal Profession Committee

FATIMA LACAYO
Domestic Violence Committee

MARY MARGULIS-OHNUMA
Policy Counsel, New York City Bar Association;
Women in the Legal Profession Committee

JACQUELINE MEESE
Sex & Law Committee

ALANA SLIWINSKI
LGBT Rights Committee

STEPHANIE STAAL
Domestic Violence Committee

JORGE TENREIRO
LGBT Rights Committee

AMY VEGARI
Civil Rights Committee

KRISTIN YORK
Domestic Violence Committee